Supreme Court, U.S.
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NO. 88-1091

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EVANNA POWELL,
Petitioner,

VERSUS

ANTHONY NIGRO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Procedural Background

The route by which this case has arrived at this juncture has been a circuitous and arduous one. Petitioner, Evanna Powell, was unsuccessful on the February 1976, July 1976, February 1977, July 1977, February 1978, July 1978, February 1979, July 1979 and February 1981 examinations for admission to the Bar of the District of Columbia. In 1979, Ms. Powell filed a Freedom of Information Act action in federal district court. The suit was dismissed for failure to state a claim upon which relief could be granted. Powell v. Nigro, No. 79-3208 (D.D.C. Jan 25, 1980). The United States Court of Appeals for the District of Columbia Circuit upheld the district court's decision on appeal. Powell v. Nigro, No. 80-1147 (D.C. Cir. May 20, 1980). Ms. Powell's subsequent petition for certiorari was denied by this Court. Powell v. Nigro, No. 79-2057 (Dec. 1, 1980).

The present action was then initiated by Ms. Powell in October 1981. The suit was filed originally against several past and present

members of the District of Columbia Court of Appeals Committee on Admissions (hereinafter the "Committee") alleging that the manner in which the District of Columbia bar examination was administered was contrary to the requirements of the due process and equal protection clauses of the Fifth Amendment and also violated 42 U.S.C. § 1983.

On July 28, 1982, the Honorable John Lewis Smith, Jr., of the United States District Court for the District of Columbia, issued a memorandum order dismissing Ms. Powell's case for lack of subject matter jurisdiction. An appeal was docketed with the United States Court of Appeals for the District of Columbia Circuit. In light of the United States Supreme Court's decision in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), however, the Court of Appeals remanded the case to the district court for reconsideration on May 11, 1983. Powell v. Nigro, No. 82-2020 (D.C. Cir. May 11, 1983).

On remand, Judge Smith, on November 14, 1983, issued a Memorandum and Order that dismissed Ms. Powell's individual particularized claims for lack of subject-matter jurisdiction. The memorandum and order, however, permitted those claims which constituted a broad challenge to the constitutionality of the District of Columbia's bar examination process to proceed.

The defendants subsequently petitioned the district court to extend its protective order of January 17, 1984, with respect to Ms. Powell's first set of interrogatories. The defendants argued that to respond to such interrogatories would be extremely burdensome. They also renewed their motion to dismiss, this time on the basis of immunity, and sought to substitute the Committee as the party defendant. On January 16, 1985, Judge Smith ordered that the individual Committee members were entitled to absolute immunity from all of Ms. Powell's claims that sought money damages, except for those contained in paragraphs 14 and 19 of her complaint which related to the assignment of

test numbers to bar applicants. With respect to the claims which sought equitable relief, Judge Smith ruled that the individual Committee members should be dismissed as parties, and that the Committee should be substituted in their place. Finally, he determined that the January 17, 1984 protective order should not be extended and ordered the defendants to respond to interrogatories Nos. 7-14. Ms. Powell unsuccessfully petitioned the district court to alter its judgment dismissing certain counts and substituting the Committee as a party. A notice of appeal was filed in the United States Court of Appeals for the District of Columbia Circuit on March 15, 1985.

On April 3, 1985, the Court of Appeals sua sponte raised the issue of whether it had subject matter jurisdiction over Ms. Powell's appeal and ordered her to show cause as to why the appeal should not be dismissed. The appeal was dismissed for lack of jurisdiction on May 20, 1985.

The defendants renewed their motion for summary judgment in the district court on September 19, 1985, alleging that there were no material facts at issue in the case and that, as a matter of law, they were entitled to judgment. On November 13, 1985, Ms. Powell filed a motion for judgment of default on the basis that the defendants' answers to her interrogatories and their responses to her request for production of documents and request for entry to inspect and copy documents were inaccurate, incomplete, evasive or without a statutory basis for exemption. The district court denied Ms. Powell's motion in an order issued September 30, 1987. That same day, Judge Smith granted the defendants' motion for summary judgment and dismissed all of Ms. Powell's remaining claims.

On October 29, 1987, Ms. Powell instituted an appeal in the United States Court of Appeals for the District of Columbia Circuit seeking review of the district court's orders dated January 17, 1984, January 16, 1985, and September 30, 1987.

The respondents, on December 18, 1987, filed a motion seeking summary affirmance of the district court's orders that were listed in Ms. Powell's notice of appeal. On that same date, Ms. Powell filed a motion requesting summary reversal of the district court's January 16, 1985 order dismissing the claims against the individual members of the Committee that sought money damages and the September 30, 1987 order granting summary judgment.

On June 6, 1988, the Court of Appeals issued an order granting the Respondents' motion for summary affirmance and denying the Petitioner's motions for summary reversal. On June 16, 1988, Ms. Powell notified the Court of Appeals that she did not intend to petition for a rehearing.

Following this Court's decision in Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777 (1988), announced on June 29, 1988, however, the Petitioner, on July 6, 1988, filed a notice of the Watson decision with the Court of Appeals. Ms. Powell requested that the Court of Appeals

either decide her case in conformity with the disparate impact analysis set forth in Watson, or remand the case with instructions.

Statement of the Facts

In her complaint, Ms. Powell claimed that the individual named members of the Committee violated the due process and equal protection clauses of the Fifth Amendment as well as 42 U.S.C. § 1983. These assertions were based upon Ms. Powell's allegations that the Committee had no ascertainable standard for grading bar examinations; that the bar examinations were not validated; that the question on the bar application regarding the number of times an applicant had unsuccessfully taken the bar examination was used to prejudge an applicant's competency to practice law; that the examination numbers assigned to applicants were used to predetermine examination scores on the basis of the applicant's race; and that the Committee had no ascertainable standard in setting what constitutes a passing score when combining the

multi-state and essay portions of the bar examination.

The record in this case uncontrovertibly establishes, however, that the Petitioner's allegations are merely bold assertions unsupported by any factual basis. The district court found and the pleadings and papers filed in this matter as well as the record herein, unequivocally establish that Ms. Powell's contentions were without merit and had no factual basis. The application that individuals seeking admission to the Bar of the District of Columbia by examination are required to submit to the Committee does not inquire into an applicant's race. Neither in the application process nor otherwise does the Committee solicit information from an applicant regarding his or her race. In the absence of knowledge of an applicant's race, it is impossible for the Committee to single out individual applicants for disparate treatment on the basis of their race.

Pursuant to Rule 46(b)(7) of the Rules of the District of Columbia Court of Appeals, each applicant is furnished with an examination number. It is this number and not their name that applicants are required to place on their examination papers. The numbers are randomly assigned without regard to the contents of an individual's application. The numbers are not selected by the bar examiners but instead are assigned by employees of the District of Columbia Court of Appeals who are responsible for the administrative processing of applications. Under subsection (b)(7) of Rule 46, the disclosure of an applicant's number is prohibited. Thus, while the examinations are being graded, the examiners are not privy to an applicant's name, race or prior bar examination history.

ARGUMENT

. Petitioner erroneously contends that the decision of the Court of Appeals in this matter was contrary to this Court's recent decision in Watson v. Ft. Worth Bank & Trust, 108 S.Ct. 2777

(1988), and in conflict with its own decision in Hopkins v. Price Waterhouse, 825 F.2d 458 (D.C. Cir. 1987). The Court in Watson, as Petitioner accurately noted, found that, in the context of certain forms of employment discrimination, disparate impact analysis is an appropriate vehicle of inquiry. The language of Watson was focused, however, on employment discrimination (the case was brought under Title VII of the Civil Rights Act of 1964, as amended), and is therefore not directly applicable to the discrimination alleged by Ms. Powell. Similarly the decision of the District of Columbia Circuit in Hopkins was also addressed to an allegation of employment discrimination.

The thrust of Petitioner's argument, as it relates to these cases, appears to be that the evidence, both statistical and otherwise, that she submitted was sufficient to establish a prima facie case, thereby shifting the burden to the Committee to come forward with evidence that the actions alleged by Ms. Powell were not discriminatory. The flaw in Ms. Powell's

argument, however, is her assumption that she had made out a prima facie case of discrimination. Two courts have reviewed the "evidence" submitted by the Petitioner to substantiate her claim of discrimination and both have found it lacking. After reviewing the record, the district court in its order of September 30, 1987, found that Ms Powell's "allegation that the members of the Committee discriminate against Black applicants" was "entirely void of merit." (Petition For Writ of Certiorari Appendix [hereinafter "Appendix"] at A-8). The record unambiguously discloses that the Committee does not solicit information regarding the race of applicants during the admission process and that, even if it did, the method by which examination numbers are assigned to applicants would make it impossible for the members of the Committee to track applicants on the basis of their race.

Summary Judgment Was Appropriate As To Petitioner's Equal Protection Claims

Ms. Powell initially claims that the bar examiners utilize the bar examination as a

devise to purposefully discriminate against prospective black attorneys on the basis of race. In support of her contention she alleges that; (1) there is no ascertainable standard for grading the bar examination; (2) a disproportionate percentage of blacks have previously been unsuccessful on the bar examination; and (3) the Committee has predetermined, on the basis of examination number assigned, that a disproportionate percentage of blacks would be unsuccessful.

Respondents have consistently denied that they harbor any racial animus, and have also affirmatively demonstrated their inability to discover an applicant's race during the grading process. Under Rule 46(b)(7) of the Rules of the District of Columbia Court of Appeals, each applicant is given an examination number. Only that number and not the name of the applicant is placed on the examination papers. The examination numbers are assigned by employees of the District of Columbia Court of Appeals on a random basis, without regard to any information

provided in the applications. Affidavit of Anthony Nigro dated March 28, 1985 (Appendix at A-82 to A-84). The members of the Committee do not participate in the assigning of examination numbers. Id. at A-83. Further disclosure of the examination number of any applicant is prohibited. D.C. Ct. App. R. 46(b)(7) of the Court Rules of the District of Columbia Court of Appeals. Anthony Nigro, Director of the Committee on Admissions, has indicated that the Committee does not solicit, through the application process or otherwise, information to the race of applicants. Appendix at A-83 to A-84. The Committee does not know the race of an applicant when he or she is assigned an examination number. Consequently, the bar examiners have no knowledge of, nor any means of learning the race of a person whose paper they are grading.

The Committee has demonstrated not only the absence of any discriminatory motivation on its part of the Committee, but also the inability of the Committee to effectuate any predisposition

of examination results such as that claimed by Ms. Powell. Given this showing of the absence of any genuine issue of material fact as to the examiner's direct access to information concerning an examinee's race during grading, summary judgment as to Ms. Powell's claims of intentional discrimination claims was warranted. See Tyler v. Vickery, 517 F.2d 1089, 1093 (5th Cir. 1975); Feldman v. State Board of Bar Examiners, 438 F.2d 699, 701 (8th Cir. 1971). Absent discriminatory conduct, discriminatory intent, even if it were found to exist, is an immaterial issue of fact. Tyler v. Vickery, 517 F.2d at 1093.

Ms. Powell also contends that, irrespective of intent, the District of Columbia Bar examination inherently denies equal protection of the law to black applicants because of the disproportionate rate at which they fail the examination. Ms. Powell, however, fails to even make out a prima facie case that the District of Columbia bar examination has a disparate impact on blacks.

As noted previously, the Committee does not solicit information as to the race of applicants. Thus, even the Committee does not know what percentage of black applicants who fail any bar examination.

Even assuming, arguendo, that the District of Columbia Bar examination has a disproportionate impact on blacks, such impact, standing alone, does not serve to create a classification based on race which is necessary to trigger strict judicial scrutiny. Washington v. Davis, 426 U.S. 229 (1976); Jefferson v. Hackney, 406 U.S. 535 (1972); McClaughlin v. Florida, 379 U.S. 194 (1964); Tyler v. Vickery, 517 F.2d at 1099. Claims based on asserted violations of the Fifth Amendment are required to show not only a discriminatory impact but also discriminatory intent Washington v. Davis, 426 at 246; Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). Respondents have clearly negated any inference that they discriminated on the basis of race.

Since the District of Columbia bar examination does not establish a suspect racial classification, there is no legal basis for applying the compelling state interest test, and the proper standard of review is the rational relationship test. Tyler v. Vickery, 517 F.2d at 1101. In Schware v. Board of Examiners, this Court held that "(a) state can require high standards of qualification such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Examiners, 353 U.S. 232, 239 (1957). Courts uniformly have held that the bar examination has a rational relationship to an applicant's fitness and capacity to practice law. Tyler v. Vickery, 517 F.2d at 1101; Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974); Feldman v. State Board of Law Examiners, 438 F.2d 699, 705 (8th Cir. 1971); Chaney v. State Bar of California, 386 F.2d 962,

964 (9th Cir. 1967); Harper v. District of Columbia Comm. on Admissions, 375 A.2d 25 (D.C. 1977).

Ms. Powell argues, that there is no ascertainable standard for grading the bar examination and that this lack of an applicable standard has caused grades to be assigned in an arbitrary and capricious manner. In essence, she is contending that the bar examination is irrationally administered because the outcome depends so heavily on the subjective grading judgments of the examiners. Subjective grading is a necessary corollary to the administration of essay-type questions, however, and therefore an attack on subjective grading, must include the allegation that the use of an essay examination is itself irrational. This contention has been uniformly rejected by all courts which have considered it. See, e.g., Tyler v. Vickery, 517 F.2d at 1102; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 477; Feldman v. State Board of Law Examiners, 438 F.2d at 705; Chaney v. State Bar of

California, 386 F.2d at 964. An essay-type examination ensured that applicants have the capacity to analyze general legal situations and apply abstract legal principles -- skills which a practicing attorney must possess. It provides an indication as to the possession, or lack thereof, of knowledge in the legal fields to which the questions relate. Ms. Powell's assertions do not raise an issue of material fact as to whether the bar examination is irrational. As such, Respondents were entitled to judgment as a matter of law as to equal protection claims.

Summary Judgment Was Appropriate As To Petitioner's Due Process Claims

Ms. Powell also contends that she has been denied due process of law in violation of the Fifth Amendment of the United States Constitution. Her alleged facts which support this contention include, (1) that the procedures for review of a failing grade are insufficient; (2) that the bar examination--used to measure one's proficiency in law -- has not been validated; (3) that the examiners who

judged the applicant's proficiency in law were not qualified to do so; (4) that the Committee has no ascertainable standard for determining the combined essay and multi-state examination scores or the value of prior multi-state examination scores.

Under Rule 46(b)(12) of the Rules of the District of Columbia Court of Appeals, unsuccessful applicants are entitled to review the essay section of the examination and the examiner's questions and comments thereto. The applicant may then submit a petition for regrading setting forth the reasons in support thereof. An applicant, who remains unsuccessful after the petition for regrading is disposed of, can petition for a final review by two new examiners. See Harper v. Dist. of Columbia Comm. on Admissions, 375 A.2d at 26-27.

Petitioner argues that this "paper review" constitutes a denial of due process. Ms. Powell asserts that she was not afforded an opportunity to directly confront the examiners, not given reasons why her answers were wrong,

and not allowed to compare her answers with the answers of successful examinees.

While the opportunity to be heard is generally considered a fundamental component of due process, entitlement to a hearing does not automatically flow from a finding that procedural due process is applicable. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). Whether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of the procedure inflicts upon him, against the interests which the government seeks to advance by denying it. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). While Petitioner's interest might be a weighty one in determining whether due process protections are applicable, it militates in favor of a hearing only if a hearing is demonstrably a more efficacious means of safeguarding that interest than current procedures provide.

Unsuccessful applicants are allowed to retake the bar examination at its next administration. Reexamination provides an adequate means of exposing grading errors. Tyler v. Vickery, 517 F.2d at 1104; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 478; Brewer v. Wegman, 691 F.2d 216, 217 (5th Cir. 1982). Upon reexamination, an individual is entitled to have his paper graded by the same standards as those of everyone else, and if she or he passes, to be admitted on precisely the same basis as an applicant who had not previously taken the examination. Even making the generous assumption that one out of every hundred applicants who take the bar examination fails when they should have passed due to arbitrary grading, the probability that the same individual would be the victim of error after two reexaminations is infinitesimal.

Furthermore, since regularly scheduled examinations are held every six months, and each administration produces scores of unsuccessful applications who would be entitled

to hearings, it would be unlikely that providing a hearing would afford significantly quicker relief to an erroneously failed applicant than the right to retake the examination at the next administration. Moreover, requiring a hearing for each of these applicants would place an intolerable burden upon the bar examiners, especially when one considers that bar examiners are not full time administrators but are practicing attorneys. Tyler v. Vickery, 517 F.2d at 1105; Whitfield v. Illinois State Board of Law Examiners, 504 F.2d at 478.

The Committee's current procedural safeguards are certainly effective in exposing grading errors. Applicants are allowed not just one, but two opportunities for regrading. Additional procedures would not necessarily effectuate a more efficacious means of safeguarding applicant's interests, especially in light of the burden they would entail. Likewise, the opportunity to compare one's examination with others would be virtually meaningless unless one are also able to confront

the bar examiners and obtain from them explanations of their grades.

Ms. Powell also contends that the bar examination -- used to measure one's proficiency in law -- has not been validated pursuant to court established criteria for test validation, and hence, she has been denied due process of law. However, for purposes of applying the due process clause of the Fifth Amendment, it is not necessary that examinations in general, or the bar examination in particular, be professionally validated. Washington v. Davis, 426 U.S. 229 (1977); Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). All that is constitutionally required, is that the bar examination have a rational relationship to the practice of law. As noted supra, courts have uniformly held that bar examinations meet this standard.

Ms. Powell asserts that she was denied due process of the law because the examiners who judged her proficiency in the law were not qualified to do so. She contends that the bar

examiners were neither specialists nor had they received Masters of Law degrees in the area of their respective questions. These disputed fact issues, which Ms. Powell has claimed necessitate a trial, are at bottom only claims that the examination could be improved. The argument overlooks one of the most fundamental distinctions between the strict scrutiny and rational relationship standards of review -- the relevance of the availability of alternative means. A party defending a classification subject to strict judicial scrutiny must demonstrate that there is no other available means which impinges less on the protected interest involved. See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960). The focus of the rational relationship test, however, is not whether a party has superior means available to accomplish its objectives, but whether the means it has chosen are reasonable. No court has held that bar examiners hold LL.M degrees or must be specialists in their field of questioning. Presently, bar examiners in the District of

Columbia are practicing attorneys appointed by order of the District of Columbia Court of Appeals. These examiners undeniably have the legal experience to determine whether an applicant possess the minimal level of competency required to practice law. Viewed from this perspective, Ms. Powell's asserted factual issues are simply not material.

Finally, Petitioner contends that she was denied due process of law because the Committee has no ascertainable standard for determining the combined score when the essay and multi-state examination scores are merged or for determining the value of a prior multi-state examination score that is used on subsequent examinations. As with her previous claims, Ms. Powell has failed to raise a genuine issue of material fact.

Both the essay and the multi-state bar examination portions of the examination are designed to assess the legal competence of applicants. The "equi-percentile" method is used both to determine the combined score on

each examination when the essay score and multi-state score are combined, and to determine the value of a prior multi-state bar examination score used on a subsequent bar examination. By arguing that the Committee does not have an ascertainable standard for determining the combined score, Ms. Powell essentially is contending that the bar examination, in its present form, is an irrational device for measuring one's proficiency in the law. This contention has been unanimously rejected by all courts which have considered it. Tyler v. Vickery, 517 F.2d at 1102; Whitfield v. Illinois Board of Law Examiners, 504 F.2d at 477; Feldman v. State Board of Law Examiners, 438 F.2d at 703.

Ms. Powell has presented no genuine issue of material fact and Respondents were entitled to judgment as a matter of law as to the due process claims. The Court of Appeals' summary affirmance was therefore appropriate.

Summary Judgment Was Appropriate As To Petitioner's 42 U.S.C. § 1983 Claims

Ms. Powell's claim brought pursuant to 42 U.S.C. § 1983 must fail for the same reasons her equal protection and due process claims failed. Powell v. Nigro, No. 81-2622, Memorandum at 13 (D.D.C. Sept. 30, 1987). Constitutional claims brought pursuant to 42 U.S.C. § 1983 require intentional discrimination. Washington v. Davis, 426 U.S. 229 (1977); Richardson v. Pennsylvania Department of Health, 561 F.2d 489 (3d Cir. 1977). Ms. Powell is therefore required not only to prove discriminatory impact, but also a discriminatory intent on the part of Respondents. Ms. Powell has failed to show the existence of any genuine issue of material fact as to the Respondents' ability to effectuate discriminatory intent and thus has failed to assert a violation of her constitutional or statutory rights actionable under 42 U.S.C. § 1983. Moreover, Respondents have negated any possible inference of discrimination by showing that (1) the Committee does not solicit information from applicants as

to race, and (2) Committee members do not have access to information regarding the race of applicants when grading the examinations. Respondents were entitled to judgment as a matter of law as to Ms. Powell's Section 1983 claims, and the Court of Appeals' grant of summary affirmance was appropriate.

Respondents Are Entitled To Absolute Immunity For Certain Of Their Actions

The individual members of the Committee, as quasi-judicial officials, are entitled to the same absolute immunity enjoyed by judges with respect to matters that fall within their judicial jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978). The Committee members are entitled to such immunity, because in administering the District of Columbia bar examination and determining the fitness of applicants to practice law, they perform a judicial faction on behalf of the District of Columbia Court of Appeals. Richardson v. McFadden, 563 F.2d 1130, 1132 (4th Cir. 1977)(Hall, J. concurring). In addition, when the Committee members are performing duties

delegated to them by the District of Columbia Court of Appeals and such duties are undertaken in conformance with the standards set by the Court, then the Committee members are also entitled to absolute immunity.

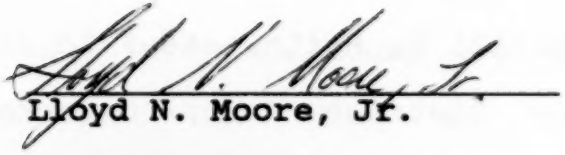
Ms. Powell's protestations to the contrary, the record in this case unambiguously indicates that the Committee and its members have consistently complied with all of Ms. Powell's discovery requests that were not limited by protective orders issued by the district court or to which they did not interpose objections. More importantly, Ms. Powell failed to request an order from the district court compelling Respondents to answer her interrogatories to which they had raised on objection or compelling inspection. In the absence of such an order, Ms. Powell is precluded from obtaining the relief specified in Rule 37(b)(2)(C).

The Granting Of A Partial Protective Order With Respect To Petitioner's First Set Of Interrogatories Was Not Error

Although the scope accorded to discovery is broad, it is not without its boundaries. Doe v. District of Columbia, 695 F.2d 1115 (D.C. Cir. 1983). In determining the appropriate scope to accord discovery in a particular case, courts are afforded wide discretion to fashion an equitable solution and are subject to reversal only upon a finding of abuse of discretion. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). The District Court undertook a careful and reasoned analysis of the burdens and benefits that would result to each party before imposing the protective order. Given the procedural posture of the litigation when the protective order was issued in this case and the potentially expansive nature of Ms. Powell's initial discovery requests, the determination that a limited protective order should issue was not an abuse of discretion and thus was appropriately affirmed by the Court.

CONCLUSION

Respondents respectfully that this Court deny the petition to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit issued in this matter on August 25, 1988.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition was mailed this 31st day of January, 1989, first class postage prepaid, to:

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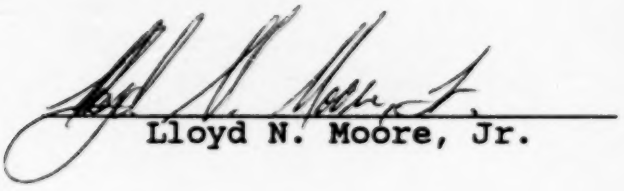

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